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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 234

OMAHA PACKING COMPANY,

Petitioner,

vs.

PITTSBURGH, FORT WAYNE & CHICAGO RAILWAY COMPANY; THE PENNSYLVANIA RAILROAD COMPANY, AND THE ALTON RAILROAD COMPANY,

Respondents.

ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OPPOSITION TO PETITION FOR CERTIORARI.

FREDERIC D. MCKENNEY,
SILAS H. STRAWN,
FRANK J. LOESCH,
JOHN D. BLACK,
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For Respondents.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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OPPOSITION TO PETITION FOR CERTIORARI.

Reference to Report of Opinion Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit has been reported since the filing of the petition herein. It appears in 120 Fed. (2d) 594.

Statement of the Case.

Petitioner's statement of the case (Pet. 1-6, 12)* is inaccurate and incomplete in the respects hereinafter stated.

Petitioner has attempted to argue the weight of the evi-

* The petition for Writ of Certiorari and accompanying brief, which are numbered consecutively, are herein referred to as "Pet.", followed by the page reference.

dence by presenting in its statement only its own version of the controverted issues. Petitioner states (Pet. 2) that the fire which destroyed its plant spread thereto "as the result" of the delay of the fire-boat caused by the failure of respondents' bridge to rise. The question of whether the spread of the fire was the result of this delay was one of the principal controverted issues on which the court and jury found against petitioner.

Petitioner states (Pet. 2) that it introduced evidence showing the mechanical defect responsible for the failure of respondents' bridge to rise, but not the cause of that defect. This is in contrast to petitioner's statement in the Circuit Court of Appeals, as shown by the opinion of that court. The Court of Appeals stated that the reason for the failure of the bridge to rise was not only proved by petitioner, but in its brief was conceded in the following statement (R. 844):

> "Plaintiff's evidence showed that the physical cause of the failure of the bridge to rise was the fact that a cotter pin had come out of one end of a bronze wrist pin. The latter had to be in its proper place in order for the interlocking control machinery to permit the bridge to rise. The absence of the cotter pin had permitted the bronze wrist pin to slip out of place. When an employee of another railroad replaced the bronze pin the bridge lifted. The control equipment in question was in a padlocked and sealed lever box which could only be opened by breaking the seal or by an employee having a key to the padlock."

Petitioner states (Pet. 2) that the Circuit Court of Appeals held that the doctrine of *res ipsa loquitur* was applicable to the failure of the draw-bridge to rise on proper signal. Although the grounds of the Court of Appeals' holding are of course immaterial, if its decision was correct, for the sake of accuracy it should be pointed out that the Circuit Court of Appeals specifically refused to decide whether the doctrine of *res ipsa loquitur* could have ap-

plied, stating (R. 844) that it assumed, without deciding, that on a record differing from the one here presented there might have been disclosed a situation wherein the doctrine would have been applicable. Furthermore, petitioner's statement of the Circuit Court of Appeals' holding is inaccurate in that it says (Pet. 2) that the court held that the refused instruction on *res ipsa loquitur* was "technically improper", whereas the court distinctly held that the instruction tendered by petitioner was defective in substance (R. 851), on the grounds that it was not applicable to the undisputed facts proved by petitioner; that it permitted an inference of general negligence covering the bridge as a whole, although the sole reason the bridge did not open promptly was the failure of a particular cotter key (R. 844); and that the mechanical failure under the facts proved was not such as to justify an inference of negligence (R. 849). In addition to the foregoing errors in substance, the instruction was bad in form, but the Circuit Court of Appeals did not rely on the objections as to form urged by respondents against the instruction (R. 851). The petitioner seems to concede (Pet. 24-25) that the instruction may have been bad in form. The Circuit Court of Appeals said that the trial court was justified in refusing a defective instruction and was under no duty to correct it (R. 852).

There is another respect in which petitioner's statement gives an entirely erroneous impression of the issues raised and litigated in the trial court. Petitioner's statement conveys the impression that petitioner's entire case turned on the *res ipsa loquitur* instruction in question (R. 770). The fact is that most of the issues of the case were based on alleged specific negligence, and that *res ipsa loquitur* was not clearly brought to the attention of the trial court until the instruction on that point was tendered. At the close of petitioner's case, the trial court asked the question directly of petitioner's counsel, whether petitioner was

relying on the doctrine of *res ipsa loquitur,* and petitioner's counsel refused to state that he was (R. 371). The extent to which the trial court was surprised by petitioner's later insistence on the application of *res ipsa loquitur* is indicated by the statement of the trial court in disposing of the motion for a new trial (R. 794), where the court said he did not hear much about this question during the trial, and that he was not even sure that plaintiff (petitioner) was going to rely on that doctrine in view of the many specific charges of negligence against defendants (respondents).

The statement (Pet. 5) that the numerical weight of the evidence indicated that the fire spread from the Quincy Elevator to the petitioner's plant between 3:51 and 4:01 P. M. is not supported by the record. Although the witnesses violently disagreed on the time at which the fire spread, the greater number of them fixed the time that it spread to petitioner's plant either before 3:51 or after 4:01 P. M.*

Respondents' evidence tended to show that the failure of the bridge to open promptly was wholly immaterial, because even if it had opened promptly the fireboat could not possibly have arrived at the fire before 3:51 P. M., and

* The following witnesses testified that the fire spread to petitioner's plant before 3:51 P. M.: Byrnes (R. 467); Hector (R. 473); McClaughry (R. 483); Oelrich (R. 492); Honan (R. 499); Morton (R. 515); Plant (R. 438); Langher (R. 461); Koopman (R. 465); Taylor (R. 482); Bragg (R. 503); Scott (R. 504); and Stocking (R. 510).

The following witnesses testified that the fire spread to petitioner's plant after 4:01 P. M.: Lunn (R. 172); Blair (R. 193); Gough (R. 96); McGrath (R. 92); Cornell (R. 247); Henry (R. 255); Martin (R. 227); Larson (R. 210); Andrews (R. 177); Doyle (R. 253); Hurst (R. 219); Butler (R. 209); Semon (R. 258); Gillespie (R. 266); O'Boyle (R. 237); Peterson (R. 309); Bailey (R. 207); Love (R. 187); McCurrie (R. 238); Haberkorn (R. 243); Sulkowski (R. 220); Flahive (R. 248); Evans (R. 74); Hohnsen (R. 202); Petrik (R. 257); Kemp (R. 264); Greune (R. 205); Dave (R. 181); Johnstone (R. 280); Koch (R. 297); and Schaack (R. 301).

it is apparent from defendants' Exhibit P (R. 454, 689), defendants' Exhibit R (R. 469, 693), and defendants' Exhibit S (R. 469, 695), which were parts of a photographic panorama taken between 4:01 and 4:06 P. M. (R. 453, 468), that the fire must have been in petitioner's plant long before the first mentioned time.

Petitioner makes the statement (Pet. 6) that there was no evidence in the entire record that the missing cotter key or broken fragments of it were found in the lever box when it was opened or immediately thereafter. This statement is inaccurate. One of the witnesses present when the box was opened, who testified that he himself made the repair, testified that he saw the missing cotter key after the bridge went up, lying on the desk. The actual testimony was as follows (R. 165):

> Q. "Did you see the one that was out at any time?"
> A. "I see him after the bridge go up, and I seen him laying on the desk. Mr. Preston called up there and the cotter pin was laying on the desk. That was the last time I see it."

This testimony was elicited by petitioner on direct examination, but petitioner did not ask any questions concerning the condition of the cotter key or what became of it.

Alleged Errors Urged by the Petitioner.

On the record made in this case, the petition for certiorari presents only one question:

Did the trial court commit reversible error when it refused to give the broad and general *res ipsa loquitur* instruction tendered by petitioner (R. 770)? That question necessarily turned upon the evidence in this particular case, and on the form and substance of said instruction. The undisputed evidence was that the only reason the bridge did not open promptly was the failure of a small cotter key. Also the instruction in question was incorrect

in substance and form. All other questions attempted to be presented by the petition are abstract questions which are both remote and argumentative, and are not presented by this record.

In No. 3 of the questions which petitioner attempts to present (Pet. 7), the question is stated to be whether in a *res ipsa loquitur* case it is necessary for the evidence to exclude all *possible* causes of the injury other than defendants' negligence. This language misstates the holding of the Circuit Court of Appeals. The holding of the Court of Appeals was that the doctrine of *res ipsa loquitur* is inapplicable where it can be reasonably said that the facts are as consistent with ordinary care as with negligence (R. 850).

In No. 5 of the questions which petitioner attempts to present (Pet. 7), petitioner assumes that its *res ipsa loquitur* instruction was only "technically defective." This brief will, we submit, show that the tendered instruction was seriously defective in both substance and form.

ARGUMENT.

I.

The Doctrine of Res Ipsa Loquitur Is Inapplicable to the Failure of the Bridge to Open Under the Facts in This Case.

There is only one question presented in this case, and that is a simple and concrete one: Whether the trial court committed reversible error in refusing to give a *res ipsa loquitur* instruction in view of the undisputed evidence that the only reason the bridge failed to open was the failure of a small cotter key, and in view of the errors contained in the instruction tendered by petitioner. The propriety of giving such an instruction must necessarily turn upon the evidence developed. The facts in this case are peculiar and a decision by this court on those facts would have little application to any other case.

In *Sweeney* v. *Erving*, 228 U. S. 233, this court said, page 240, that "*res ipsa loquitur* means that the *facts of the occurrence* warrant the inference of negligence, not that they compel such an inference; that they furnish *circumstantial evidence* of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient;" (Italics supplied).

The *Sweeney* case was not decided under Illinois law, which is different and less favorable to petitioner's contentions. Under Illinois law the doctrine of *res ipsa loquitur*, where applicable, creates a presumption which vanishes as soon as *any* contrary evidence is introduced.

> *Bollenbach* v. *Bloomenthal*, 341 Ill. 539, 542; 173 N. E. 670, 671. "The presumption or inference of negligence raised by the application of this doctrine

[res ipsa loquitur] is not absolute or conclusive but is rebuttable, and vanishes entirely when any evidence appears to the contrary."

Other decisions in Illinois have shown conclusively that under the law of that state it is not necessary that the contrary evidence furnish a complete explanation of the occurrence or point to the negligence of any person, but it is sufficient that the contrary evidence furnish some details of the physical occurrence alone. In the following cases the proof related only to the occurrence, not to the alleged negligent act responsible therefor, but the proof was held sufficient to make the said doctrine inapplicable

O'Rourke v. *Marshall Field & Co.*, 307 Ill. 197, 138 N. E. 625. The minor plaintiff was injured when a hand-hold on a rocking horse on which plaintiff was riding, and which was furnished by defendant, gave way. The only explanatory evidence was that the hand-hold was not securely fastened, with no proof as to who was responsible therefor. The court held the doctrine inapplicable because there was evidence of specific negligence.

Pennsylvania Company v. *Roberts & Schaefer Co.*, 250 Ill. App. 330. Plaintiff's employee was injured when a counterweight fell on him from a machine manufactured by defendant. The only evidence of the cause was that the set screw which should have held the counterweight slipped, without any proof as to who was responsible for the failure to fasten it securely, except that defendant offered proof that it had been securely fastened at the time of manufacture. The court held the doctrine of res ipsa loquitur inapplicable, because there was specific evidence as to how the accident occurred (p. 339).

Letush v. *New York Central Railroad Co.*, 267 Ill. App. 526. Plaintiff-passenger was injured when defendant's train was derailed because of a collision with an abandoned automobile on the track. There was no explanation as to how the automobile came to be there. The court held, p. 535, that in view of the evi

dence as to how the accident happened, the presumption of negligence under the doctrine of res ipsa loquitur vanished entirely.

Board of Trade v. *J. K. Company*, 290 Ill. App. 385, 8 N. E. (2d) 523. Plaintiff's employee was killed in an explosion in defendant's grain elevator. Defendant introduced extensive evidence of care and inspection, but there was no evidence as to how the explosion actually occurred, or what person, if any, was responsible therefor. The court held a res ipsa loquitur instruction shifting the burden of proof to defendant was reversibly erroneous.

Kerwin v. *Stonington Elevator Co.*, 291 Ill. App. 471, 10 N. E. (2d) 224. Plaintiff was injured when the wagon he was driving fell through a driveway over a bin in defendant's elevator. The drive could be rocked in order to dump the load. There was evidence of defendant's care but also evidence that the drive was out of position immediately after the accident. There was no explanation why the accident occurred, or what person was responsible for it. The court held the evidence sufficient to eliminate res ipsa loquitur.

We submit that under the foregoing cases the undisputed and detailed evidence in the present case, *largely introduced by plaintiff*, that the only reason the bridge failed to open was the failure of a small cotter key, completely eliminated the doctrine of *res ipsa loquitur*. Nevertheless, if the mere introduction of such undisputed and detailed evidence is insufficient to eliminate this doctrine, it is still true that negligence of defendants was not the more probable conclusion from all the evidence, and the doctrine therefore had no application.

It is the law of Illinois, as well as of the Federal courts and other jurisdictions, that negligence of defendant must be the more probable conclusion from all the facts in evidence, otherwise the doctrine of *res ipsa loquitur* does not apply.

Chicago and Eastern Illinois R. R. Co. v. *Reilly*, 212 Ill. 506, 510; 72 N. E. 454, 455. "The condition can be accounted for as readily on the hypothesis of pure accident and absence of negligence as upon the ground of negligence, and the rule is well settled that negligence cannot be presumed where nothing is done out of the usual course of business, unless that course itself is improper."

Beckwith v. *Boynton*, 235 Ill. App. 469, 480.

Kraus v. *Becker, Ryan & Co.*, 265 Ill. App. 525, 533-534.

Sicrocinski v. *E. I. Dupont de Nemours & Company*, (C. C. A. 3rd) 118 Fed. (2d) 531, 536, (cited by petitioner, Pet. 13). "The thing of importance is that an inference exculpating the defendant from guilt could also be reasonably drawn from the evidence. That, of itself, is sufficient to prevent the application of *res ipsa loquitur* or the doctrine of exclusive control."

Interstate Circuit, Inc. v. *LeNormand* (C. C. A. 5th) 100 Fed. (2d) 160, 161.

Minneapolis General Electric Co. v. *Cronon*, (C. C. A. 8th), 166 Fed. 651, 659.

Wilson v. *Colonial Air Transport, Inc.*, 278 Mass. 420, 180 N. E. 212, 83 A. L. R. 329. "It is also to be observed that the doctrine [of *res ipsa loquitur*] will not be applied if there is any other reasonable or probable cause from which it might be inferred that there was no negligence at all;" (180 N. E. at p. 214).

What is the more reasonable or probable conclusion from the evidence in the instant case? The Circuit Court of Appeals concluded that the more reasonable hypothesis was that the small cotter key, measuring about ⅜" in length, broke sometime subsequent to the last inspection by defendants, as a result of some defect not readily ascertainable by the inspector (R. 850). The reason given by the Court of Appeals for this conclusion was that operation of

the bridge within less than half an hour prior to the failure, and the looseness with which the bronze pin fitted in the holes, clearly indicated that the bronze pin was in place within half an hour prior to the failure, but that it probably could not have stayed in place for the entire week since the last inspection without the cotter key (R. 849). The court said (R. 849): "It is an almost irresistible conclusion that the cotter key was absent for a very brief period prior to the time in question." There is no evidence in the record as to *where* the cotter key that failed was found immediately after the failure. The lever box consisted of a cover having a top and three sides which lifted up and off of a base consisting of a horizontal plane and the fourth side. The machinery within the lever box was attached to the horizontal plane and the fourth side. The cotter key could have fallen out of the lever box to the floor of the shanty. See picture of lever box, Defendants' Exhibit A (R. 400, 677). The cotter key that failed may have fallen from the lever box to the floor of the shanty when the cover was lifted from said lever box or it may have remained somewhere within the machinery. It may have been found somewhere within the machinery or on the floor of the shanty. It was later seen by Chichocki on the desk in the shanty (R. 165). The defendants' inspector inspected the cotter key a week before the occurrence and found it to be in good and proper condition and position. The bridge opened in the usual manner one-half hour before the occurrence. Thus the conclusion of the Court of Appeals was correct.

Petitioner advances another theory, which is entirely speculative and not in any manner sustained by the evidence (Pet. 17). The theory requires the assumption that an unknown employee of defendants entered the lever box and removed the cotter key which was there when the defendants' inspector inspected it a week previous to the

failure. There is no evidence in the record of the authority of an unknown employee of the defendants to enter the lever box. It follows that if such an unknown employee did enter the lever box, defendants would not be liable for his actions. Since petitioner has advanced no theory which would show defendants to be negligent, we submit that negligence of defendants was not the more reasonable conclusion from the undisputed facts, and therefore the doctrine of *res ipsa loquitur* had no application.

When all the evidence was in, including the uncontradicted evidence of periodical inspection by respondents, the undisputed fact was that the bridge did not open because of a failure in the cotter key, which had occurred subsequent to the last inspection. The undisputed evidence shows that the cotter key was in apparent good condition and position at the time of the last inspection. Its failure must therefore have been due to a latent defect. If such a latent defect was the cause, then the leading manufacturer from whom the machinery was purchased would be responsible, and not respondents.

O'Hara v. *Brown Hoisting Machine Co.* (C. C. A. 3rd), 171 Fed. 394.

Pettit v. *Board of Chosen Freeholders* (C. C. A. 3rd), 91 Fed. 998.

Herricks v. *C. & E. I. R. R. Co.*, 257 Ill. 264, 100 N. E. 897.

Southern Bell Telephone Company v. *Glawson* (Court of Appeals of Georgia), 79 S. E. 488.

Grand Rapids, etc. R. R. Co. v. *Huntley*, 38 Mich. 537.

Siegel v. *Detroit G. H. & M. Ry. Co.*, 160 Mich. 270, 125 N. W. 6.

Mooney v. *Beattie*, 180 Mass. 451, 62 N. E. 725.

Reynolds v. *Merchants Woolen Company*, 168 Mass. 501, 47 N. E. 406.

Shea v. *Wellington,* 163 Mass. 364, 40 N. E. 173.
Martin v. *Studebaker Corp.,* 102 N. J. Law 612, 133 Atl. 384.
Losee v. *Buchanan,* 51 N. Y. 476.
Ardesco Oil Co. v. *Gilson,* 63 Penn. St. 146.

The cases cited by petitioner on pages 17 and 18, commencing with *Byrne* v. *Boadle,* 2 H. & C. 722, all involve facts very greatly different from those in the present case, and the facts of those particular occurrences might have warranted an inference of negligence without any rule being established thereby for the present case. The most helpful case on the precise extent to which the explanation of the occurrence must go before *res ipsa loquitur* is excluded is of course the case closest on the facts. The case closest on the facts to the present case is *Buckland* v. *N. Y. N. H. & H. R. R. Co.,* 181 Mass. 3, 62 N. E. 955, where a breakage occurred in a railroad mechanism of almost exactly the same nature, and under almost exactly the same circumstances, as in the present case, and the court held that defendant railroad had exercised the utmost care consistent with the nature and extent of its business, and that no inference of negligence remained in the case.

The argument of petitioner on page 19 of its brief proceeds on the assumption that defendants were required to furnish not only evidence sufficient to rebut petitioner's alleged prima facie case, but also a complete water-tight explanation of everything which might possibly have affected the operation of the bridge, otherwise a presumption of negligence remained. This is not the rule in Illinois under the cases previously cited. Under the Illinois rule the detailed evidence introduced by petitioner in this case had already eliminated the doctrine of *res ipsa loquitur* at the end of petitioner's case. Neither is this the rule under the case of *Sweeney* v. *Erving,* 228 U. S. 233, which has had wide influence and has been followed in many

states. (See Annotation, 53 A. L. R. 1494.) Under the rule in the *Sweeney* case the doctrine of *res ipsa loquitur* calls for an explanation but does not necessarily require one, and certainly does not require the kind of exhaustive rebuttal claimed by petitioner.

It is therefore respectfully submitted that in the present case the trial court properly refused to instruct the jury on *res ipsa loquitur* as requested by petitioner. The refusal to give this instruction raises no question calling for review by this court, because (a) this case turns entirely upon its particular facts, and no principle of general application would result from a decision thereof by this court which would add anything to the doctrine already clearly stated in *Sweeney* v. *Erving*, 228 U. S. 233; (b) the Court of Appeals correctly followed the Illinois law in holding that the detailed evidence in this case caused the presumption arising from the doctrine of *res ipsa loquitur* to vanish entirely; and (c) the Court of Appeals correctly applied the Illinois law in holding that the most probable inference or inferences from the facts in this case did not indicate negligence of defendants, and therefore the said doctrine was not applicable. This record shows that petitioner not only produced detailed evidence of the actual occurrence, but might easily have produced far more evidence which it apparently did not care to have in the record. This case therefore furnishes no precedent for the situation where plaintiff is without information as to the cause of his injury, which is the only situation adapted to the application of the doctrine of *res ipsa loquitur*.

II.

Petitioner's Instruction No. VII Was Erroneous and Was Properly Refused.

In Point IV of its Brief (Pet. 23-24), Petitioner argues that its Instruction No. VII on the doctrine of *res ipsa loquitur* was correct and should have been given as requested.

Even though it be conceded for purposes of argument that on a record differing from that here presented the doctrine of *res ipsa loquitur* might have applied in this case, the instruction as tendered was erroneous on this record under both Federal and Illinois decisions for the following reasons:

1. The requested instruction ignored the credible, undisputed evidence, which had narrowed the inquiry to a question of negligence in the failure of a particular cotter key. The basis of this objection is well summarized by the Court of Appeals as follows (R. 848):

> "By plaintiff's proof, the only thing to which negligence could be attributed was definitely fixed, and we think that any negligence in connection therewith must be treated as specific rather than general. The doctrine, however, raises an inference of general negligence with respect to the instrumentality (the bridge). In the instant case, its application must embrace any and all negligence which might be responsible for the failure of the bridge to rise. We are of the opinion that when a plaintiff, by pleading or proof, eliminates a portion of elements upon which general negligence might be inferred, the reason for the rule fails. To hold otherwise is to permit the indulgence of a false inference—one which could not exist consistently with plaintiff's proof."

The requested instruction should have been based upon all the credible undisputed evidence, and should have confined the jury to that evidence. The instruction in *Inland*

& Seaboard Coasting Co. v. *Tolson,* 139 U. S. 551, was so confined, and that is the chief distinction between the Tolson case and the present one. In the present case, instead of including in the instruction the undisputed fact that the failure was due solely to the absence or failure of a cotter key, the instruction hypothesized a general failure in inspection and maintenance, and left the jury to draw any inference it wished from such alleged general failure.

2. The requested instruction was erroneous because of its use of the term "prima facie," which is ambiguous, and likely to mislead a jury.

People v. *McCurrie,* 337 Ill. 290, 298; 169 N. E. 214, 217.

People v. *Sikes,* 328 Ill. 64, 75; 159 N. E. 293, 297.

Johnson v. *Pendergast,* 308 Ill. 255, 264; 139 N. E. 407, 410.

In the *McCurrie* case the court said, at 337 Ill. 298, 169 N. E. 217, "This court has repeatedly condemned the practice of giving instructions containing the words 'prima facie' as an abstract term." The same viewpoint was taken in the case of *McAdams* v. *U. S.* (C. C. A. 8th), 74 Fed. (2d) 37, 40.

3. The requested instruction was erroneous because under the law of Illinois it is error to instruct the jury on what constitutes a prima facie case after contrary evidence has been introduced. This principle was applied to a *res ipsa loquitur* instruction in the case of *Bollenbach* v. *Bloomenthal,* 341 Ill. 539, 542; 173 N. E. 670, 671, and the other Illinois cases cited at pages 8 to 9 of this brief. The same principle is applied generally by the Illinois courts in negligence cases.

People v. *Pederson,* 248 Ill. App. 462.

Beard v. *Haskell Park Bldg. Corp.,* 248 Ill. App. 467.

Wolf v. *Pedian,* 251 Ill. App. 564.

Riddle v. *Mansager,* 254 Ill. App. 68.

In *Inland, etc. Co.* v. *Tolson*, 139 U. S. 551, there was no evidence contrary to the strong prima facie case made by plaintiff's proof, and consequently the Tolson case is entirely consistent with the views of the Illinois courts. In our case the undisputed evidence proved that the bridge did not fail to open because of negligence in maintenance or inspection.

4. The requested instruction was erroneous because it placed an excessive burden of rebuttal on defendants. The principle laid down in *Sweeney* v. *Erving*, 228 U. S. 233, 240, that in a *res ipsa loquitur* case the facts of the occurrence warrant but do not compel an inference of negligence, is inconsistent with the burden placed upon defendants under the tendered instruction to rebut plaintiff's prima facie evidence. This burden of rebuttal is just as inconsistent with the rule laid down by the Illinois Supreme Court in *Bollenbach* v. *Bloomenthal*, 331 Ill. 539, 542; 173 N. E. 670, 671, since under the Illinois rule that the introduction of contrary evidence causes the presumption arising under *res ipsa loquitur* to vanish, there obviously can be no duty to rebut plaintiff's case, but merely a duty to introduce some contrary evidence for the jury's consideration.

In summary we submit that when both parties contend and concede that the bridge failed to open because of the failure of the cotter pin, there is no basis in the record for a *res ipsa loquitur* instruction based on inspection and maintenance of the bridge. If such an instruction should be given at all, it must be based on the cotter key that failed. The instruction tendered was in conflict with the undisputed evidence, and it was therefore erroneous. It was further erroneous because of the excessive burden of rebuttal it placed on respondents, and because of the errors in form which we have heretofore pointed out.

III.

The Trial Court Is Under No Independent Duty to Prepare a Correct Instruction Where a Request Is Defective.

Petitioner has argued (Pet. 24-25) that if the instruction tendered by it on *res ipsa loquitur* was defective, then the trial court should have modified it.

We submit that petitioner is not now in a position to make this argument because the trial court confined his ruling to the Instruction No. VII as submitted by petitioner, and petitioner did not ask that the trial court correct the instruction, nor did the trial court rule on this latter point. Reference to the record (R. 561, 597-600) will show that the trial court refused to give instruction No. VII, and that petitioner asked leave to prepare a corrected instruction, but petitioner did not obtain a definite ruling from the court as to whether it might submit such a corrected instruction. The court merely said that he would give further thought to No. VII, and that he was very much doubtful of giving the substance of the instruction in any event (R. 600). Although the court was thereupon adjourned for the luncheon period, no corrected instruction was submitted by petitioner, nor did petitioner obtain any further ruling on the point. In petitioner's motion for new trial no error was alleged in any refusal to modify the instruction (R. 784-792), but the only error urged was the failure to give it (R. 786, point 9). Moreover, the trial court was misled throughout the trial by the failure of petitioner to rely on the doctrine of *res ipsa loquitur* (R. 371), as shown by the statement of the trial court in ruling on the motion for a new trial (R. 794).

This conduct of petitioner was not in accordance with the spirit or letter of the Federal Rules of Civil Procedure. Rule 46 requires that a party make known to the court the action he desires the court to take. Rule 51 provides that

no party may assign as error the failure to give an instruction unless he objects to such failure before the jury retires. Petitioner did not request the court to modify or correct said instruction and it ought not be heard to complain of the failure of the court to do what the court had not been requested to do.

Furthermore, even though the point had been properly presented, there is no such duty on the trial court as petitioner claims. The Circuit Court of Appeals well said, in summarily disposing of this contention (R. 852):

> "We do not think it necessary to discuss this contention. The weight of the authority is to the effect that a court is under no independent duty to supply correct instructions where requests are defective. *Phoenix Railway Co.* v. *Landis*, 231 U. S. 578; *Stewart* v. *Capital Transit Co.*, 108 F. (2d) 1, 3 [certiorari denied 309 U. S. 657]; *Mansfield Hardwood Lumber Co.* v. *Horton*, 32 F. (2d) 851."

The cases cited by petitioner do not support petitioner's contention.

The case of *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, is chiefly relied upon by counsel for petitioner in support of their point. The question presented there was whether the Arizona Constitution, which provided that the defense of contributory negligence was one for the jury, prevented a Federal Court in that State from directing a verdict for the defendant. In deciding that the Arizona Constitution had no such effect the Court used the phrase quoted by counsel that a federal judge was not a mere moderator. The case does not support counsel's point.

Likewise, the case of *St. Paul F. & M. Ins. Co.* v. *Bachmann*, 285 U. S. 112, gives petitioner no support on this point. In that case incorrect instructions were submitted and given by the trial court on behalf of the plaintiff. On other issues the defendant failed to submit any proper instructions. The Supreme Court pointed out that the fail-

ure of the defendant to submit proper instructions did not prevent it from objecting to erroneous ones given by the court at the instance of the plaintiff. The court at no point, directly or indirectly, indicated there was any burden on the trial court to independently prepare instructions for the defendant. The total failure of the Supreme Court in this opinion to point out that there was such a burden indicates that no such duty exists.

The trial court was not obligated to correct a tendered instruction that was erroneous in form or substance, nor to give a correct instruction in place of a tendered instruction erroneous in either form or substance.

Conclusion.

The present case is the familiar one in which a disappointed party hopes that by pursuing appeals to the limit it may succeed in convincing an appellate court that some error has occurred which would justify its having another day in court. The trial of the present case lasted six weeks. The only error which petitioner has found to present to this court is the refusal of one instruction. The jury found for the respondents. The trial court ruled against petitioner on motion for a new trial. The Circuit Court of Appeals, after careful consideration of the case, has affirmed the judgment. There is nothing in the facts of the present case which would warrant review by this court.

This case does not present the situation where an injured person must have the benefit of the doctrine of *res ipsa loquitur* or be denied relief. The facts were open to petitioner and were developed by it as fully as it saw fit to do.

It is therefore respectfully submitted that certiorari should be denied.

Respectfully submitted,

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